United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

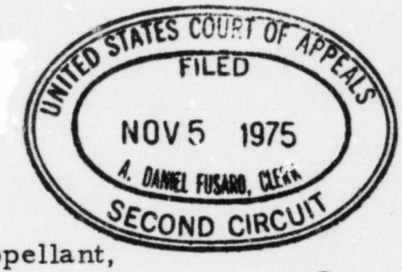
75-7512

To be argued by
DAVID A. FIELD

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



CARLO BORDONI,

Plaintiff-Appellant,

-against-

TWIN COAST NEWSPAPERS, INC.
and HAROLD GOLD,

Defendants-Appellees.

ON APPEAL FROM AN ORDER AND JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT

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ISSUES PRESENTED FOR REVIEW

(1) Whether the newspaper article published in the Journal of Commerce on June 26, 1974 is libelous *per se*;

(2) Whether, even if the article was read to defame plaintiff, the Complaint must be dismissed under the New York "single instance" rule.

STATEMENT OF THE CASE

Preliminary Statement

Plaintiff, CARLO BORDONI, appeals from a judgment entered in the United States District Court, Southern District of New York, on August 7, 1975, dismissing plaintiff's Complaint against the defendants. (A 95).

This is a libel action against Twin Coast Newspapers, Inc., publisher of the Journal of Commerce, and Harold Gold, managing editor, predicated upon a newspaper article which appeared in the Journal of Commerce on June 26, 1974. In his Complaint, the plaintiff alleged that the article was libelous *per se*, thereby obviating proof of special damages, because it (1) defamed plaintiff in his business calling as an expert in international financial affairs; and (2) intimated participation and involvement on the part of plaintiff in criminal acts in violation of Federal banking and other laws. (A 3)

Before serving an Answer, the defendants moved to dismiss the Complaint on the grounds that as a matter of law, the article was not libelous per se. District Judge Edward Weinfeld granted defendants' motion. He held that a reading of the article did not substantiate plaintiff's claims that the article reflected adversely upon plaintiff's business competency and integrity or charged him with participating in any criminal conduct. The Court held that no fair innuendo could justify plaintiff's interpretation of either article. (A 72-76).

On this appeal, plaintiff contends that the Court erred in dismissing the Complaint in that the article was libelous per se.

Defendants simultaneously moved to dismiss on the grounds that the Complaint failed to properly allege the jurisdiction of the District Court. However, on oral argument, the parties stipulated to amend the Complaint with respect to jurisdiction so that that portion of the motion was withdrawn. (A 63-64).

Statement of Facts

(a) The Complaint

Plaintiff's Complaint asserts four claims for relief. The first portion of the Complaint alleges the status of the parties and the experience and qualifications of plaintiff as an international banker and monetary expert; that in or about August, 1972, plaintiff was elected as an outside member of the Board of Directors of Franklin New York Corp. ("Franklin"), a holding company whose principal subsidiary was Franklin National Bank (the "Bank"); and that at no time was plaintiff responsible for any foreign currency transaction to which the Bank was a party. (A 3-6).

The Complaint further alleges that on June 26, 1974, a newspaper article was printed, published, and circulated by defendants containing certain false, defamatory, and libelous statements concerning plaintiff, and that said article is libelous per se. (A 7-13). The article is hereinafter set forth in its entirety with certain portions underscored by the authors of this Brief so as to call to the Court's attention that language which directly or indirectly relates to plaintiff.

SINDONA TO FOLLOW?
Italy Banker Resigning
From Franklin Board

"A Milan banker closely associated with Italian Financier Michele Sindona, the major stockholder in Franklin New York Corp. - parent of the financially troubled Franklin National Bank - is resigning from the board of the bank's holding company, a Franklin spokesman confirmed Monday.

"Carlo Bordoni, a Milan banker who is director of Fasco International Holding. S.A., an investment company owned by Mr. Sindona, is leaving the board. He is the only other director of the Fasco Empire besides Mr. Sindona to sit on the Franklin Board.

"Mr. Bordoni's resignation prompted speculation that Mr. Sindona, who bought a 21.6 percent stake in Franklin several years ago, might also leave the board. The New York Times said 'Mr. Sindona might be withdrawing - either by plan or from pressure from the regulatory authorities - from Franklin.' But the Franklin spokesman, Arthur G. Perfall, senior vice president, said there was 'no indication' Mr. Sindona plans to resign.

"Mr. Bordoni's exit from the board also raised questions about his role in the bank's foreign exchange trading.

"Franklin disclosed last week a $63.6 million loss for the first five months of 1974, $45.8 million of this from foreign exchange transactions, putting tha nation's 23rd largest bank in financial jeopardy.

"According to the Italian business magazine Successo, Mr. Bordoni was chosen by Mr. Sindona to play a major part in Franklin's foreign exchange trading. An article in the March issue said in part, 'Mr. Sindona plans to make money (at Franklin National) out of foreign currency. The presence at Franklin of the foreign exchange expert, Carlo Bordoni, explains everything.'

"When Franklin early in May announced omission of the second quarter dividend, it disclosed discovery of large losses from unauthorized foreign exchange trading. The bank's president was dismissed and its executive vice chairman, in whose department the losses occurred, resigned. Other changes were made in the international currency department. Earlier this month, a Treasury official said the government is investigating the possibility of fraud in connection with the losses.

"Should Mr. Sindona follow Mr. Bordoni out of the board room, the immediate future of Franklin National could become even more clouded than it is now.

> "Mr. Sindona, in an effort to rescue the bank, had agreed to purchase any unsubscribed shares of two Franklin New York stock offerings designed to raise $50 million. But in Thursday's announcement of the resignation of Harold V. Gleason as chairman of the bank and its parent company, it was disclosed the Sindona offer was made conditional on two points: 'Continuation of the bank's normal business and the absence of proceedings challenging the agreement.'
>
> "There have been no reports of lawsuits brought against Franklin in the interim. However, it is felt, these conditions allow the Italian financier leeway in his agreement to pump $50 million into the holding company."

A copy of the article was annexed as Exhibit "A" to the plaintiff's Complaint and is set forth at Page A 13 of the Joint Appendix.

Plaintiff's Claims for Relief

The first claim for relief alleges the defendants' wilfull and malicious printing, publication, and circulation of the false and defamatory article alleged to be libelous per se; that as a result thereof, BORDONI was financially injured, embarrassed, humiliated; and that the article impeached his character, credibility, honor, integrity, and professional competence; that plaintiff as a result thereof is entitled to exemplary damages of $2,500,000. (A 7)

The second claim for relief is similar to the first and alleges that the article was libelous per se, but alleges

that the printing, publication, and circulation of the article was in reckless disregard of the truth, injuring plaintiff as in the first claim for relief and seeks exemplary damages of $2,500,000. (A 8)

The third claim for relief alleges the printing, publication, and circulation of the false and defamatory article which was alleged to be libelous per se, that the defendants acted recklessly and/or negligently in publishing the article without investigating the truth; that Franklin is a publicly owned company traded on the New York Stock Exchange and required to file periodic reports; that the article meant and was understood by persons reading it to mean that BORDONI had participated in criminal acts in violation of Federal banking regulations and disclosure requirements; that as a result BORDONI had been injured in the same manner as in the first and second claims for relief and seeks exemplary damages of $2,500,000. (A 9-10)

The fourth claim for relief alleges that the article was false and defamatory and libelous per se; that BORDONI was injured in the same manner as in the first and second claims for relief and seeks compensatory damages of $5,000,000. (A 10-11)

(b) Defendants' Motion to Dismiss

Prior to serving an Answer, defendants moved to dismiss the Complaint upon the grounds that the article was not libelous per se, and that thus, due to the failure of the Complaint to

plead special damages, the Complaint must be dismissed. The plaintiff argued that the article was libelous per se so that special damages need not be pleaded.

The defendants' motion came upon to be heard on October 29, 1974, before District Judge Edwin Weinfeld where oral argument was presented together with arguments in the libel cases of Carlo Bordoni vs. Washington Post Company, Jack Egan, and B.C. Bradlee (74 Civ. 3169), also on appeal before this Court, and Carlo Bordoni vs. New York Times Company, Inc., A.M. Rosenthal, and John H. Allan, (74 Civ. 3168), not before this Court on appeal. (A 14-71)

(c) Disposition in the Court Below

District Judge Weinfeld hald in a 5-page opinion (A 72-76) that reading the article as a whole and giving the words their natural, plain, and unaltered meaning with special emphasis on those portions which referred to plaintiff did not justify plaintiff's claims that either of the articles reflect adversely upon plaintiff's business competency and integrity or charge him with participating in any criminal act. The Court further held that no fair innuendo could justify plaintiff's interpretation of either article.

On this appeal, plaintiff contends that the article of June 26, 1974, is libelous per se as a matter of law; that, therefore, the Court erred in dismissing the Complaint; and that

the judgment (A 95) appealed from should be reversed.

A R G U M E N T

Summary of Plaintiff's Position

The position of plaintiff on this appeal remains the same as it was in the District Court, which is that the article is libelous per se in that it (1) reflects adversely upon plaintiff's business competency and integrity, and (2) charges him with participation in criminal conduct. Plaintiff further argues that the New York "single instance" rule is no bar to plaintiff's recovery.

POINT I

THE ARTICLE COMPLAINED OF IS LIBELOUS PER SE

(a) For the Purposes of Defendants' Motion, the Allegations of the Complaint are Deemed Admitted

The law is well established that on a motion for judgment on the pleadings every material fact stated in the Complaint is deemed admitted and that the Court must accept the allegations in the Complaint as true, Blanshard vs. City of New York, 262 N.Y. 5 (1933). Furthermore, the Court must construe the pleading liberally and make all reasonable inferences to sustain it. The Norman Company Inc. vs. County of Nassau, 27 A.D. 2d 936, 278 N.Y.S. 2d 719 (2d. Dept. 1967).

In Harrison vs. Winchell, 207 Misc. 275, [illegible] S. 2d 82 (Sup. Court, N.Y. Co. 1955) plaintiff, a professional writer of wide reputation, brought an action for libel based upon the following words written by Walter Winchell: "Life settled out of Court with labor leader Van Arsdale over Chas. Yale Harrison's [the plaintiff's] 'Van Arsdale's Tight Little Island' piece a few seasons ago. Paid him $17,500." Defendants moved to dismiss the plaintiff's Complaint, claiming that the article was not libelous per se and that no special damages were alleged. The learned Justice Matthew M. Levy in denying the defendant's motion reviewed the guidelines to be followed by the Court:

> "On the present application - a motion for judgment on the pleadings - I must (in an action for libel as in other types of cases) take the complaint as it is, and not only assume it to be true, but construe it liberally, invoke every inference in its favor, make all reasonable implications to support it, and interpret it if possible so as to sustain the cause of action. Solomon vs. LaGuardia, 267 App. Div. 435, 436, 46 N.Y.S. 2d 701, 702, leave to appeal denied, 267 App. Div. 957, 48 N.Y.S. 2d 335; Bentrovato vs. Crinnion, 206 Misc. 648, 133 N.Y.S. 2d 120, 125-126." 137 N.Y.S. 2d at P. 84.

Consequently, the Court must accept as true the averments in the Complaint that:

(a) Plaintiff is an acknowledged expert in the business of domestic banking, international banking, ecomonics, and monetary matters; (A 4)

(b) Plaintiff was elected an outside director of Franklin New York Corp., a holding company for Franklin National Bank; (A 5)

(c) At no time was Bordoni responsible for any foreign currency transaction to which Franklin National Bank was a party (A 6);

(d) The article published of plaintiff was false; (A 7) and

(e) Plaintiff has been damaged thereby (A 7).

(b) The Articles Cast Aspersions Upon Plaintiff in his Business and Profession and Charge that Plaintiff Engaged in Criminal Conduct

The law is sufficiently clear and the defendants admit that a publication which holds one up to public contempt or disgrace or which induces an evil or unsavory opinion of him in the minds of a substantial number of the community is libelous per se, and therefore, actionable without allegation or proof of special damages, Mencher vs. Chesley, 297 N.Y. 94 (1947); that words are libelous per se if they affect the person in his profession, trade, or business by imparting to him any kind of fraud, dishonesty, misconduct, incapacity, unfitness, or want of any necessary qualification in the exercise thereof, Moore vs. Francis, 121 N.Y. 199 (1890); that an article charging another with the commission of a crime is libelous per se; Moore vs. Mfr. Nat'l. Bank of Troy, 123 N.Y. 420 (1890), Phillips vs. Murchison, 383 F. 2d 370 (2d Circ. 1967) cert. den. 390 U.S. 958 (1968).

The article appearing in the Journal on June 26, 1974 entitled "Italian Banker Resigning From Franklin Board" makes the following statements and innuendos:

1. That Bordoni (plaintiff) is resigning from the Board of Directors of Franklin New York Corp., parent of Franklin National Bank.

2. That Bordoni is "closely associated" with Sindona.

3. That according to the New York Times, "Mr. Sindona might be withdrawing - either by plan or from pressure from the regulatory authorities - from Franklin."

4. That, therefore, by innuendo, Bordoni might be withdrawing either by plan or from pressure from regulatory authorities.

5. That "Bordoni's exit from the Board also raised questions about his role in the Bank's foreign exchange trading."

6. That Franklin National Bank is "financially troubled and lost...$45.8 million...from foreign exchange transactions."

7. That "Bordoni was chosen by Mr. Sindona to play a major part in Franklin's foreign exchange trading" and "to make money (at Franklin National) out of foreign currency."

8. That, in fact, Franklin has "disclosed discovery of large losses from unauthorized foreign exchange trading."

9. That therefore, by innuendo, Bordoni has been responsible for these large losses from foreign exchange trading.

10. That, therefore, by innuendo, Bordoni has been responsible for unauthorized foreign exchange trading.

11. That "the government is investigating the possibility of fraud in connection with the losses."

12. That, therefore, by innuendo, the government is investigating Bordoni and the "possibility" that he committed "fraud in connection with the losses."

13. That "the Bank's President was dismissed and its executive vice chairman, in whose department the losses occurred, resigned. Other charges were made in the international currency department."

14. That, therefore, Bordoni's resignation is related to the dismiss[illegible] of the Bank's President and the resignation of the executive vice chairman.

In determining whether those statements and innuendos are libelous per se, this Court's attention is respectfully called to Judge Levy's bases for his ruling in Harrison vs. Winchell, supra:

> "The question now to be resolved by the court is - Is the publication, in the light of the proper innuendoes alleged in the complaint, libelous per se? I see no need to include in this opinion an analysis of the many precedents, pro and con, cited to me on this point. Each case must be decided on its own, for not often are claimed defamatory statements in precisely the same language or to be considered in exactly the same factual framework. I am of the view that a permissible innuendo in the case at bar is that Life Magazine was compelled to and did buy its peace because of a wrong done by the plaintiff with respect to the article written by him and published in the magazine...If, as I see it, the statement published by the defendants is susceptible of two meanings - one defamatory and one non-defamatory - the adoption of the proper meaning in the light of all the facts would be a matter for the determination of the jury, Cooper vs. Rochester Ice Cream Co., 212 N.Y. 341, 106 N.E. 117." 137 N.Y.S. 2d at P. 84, 85.

The Journal article casts negative aspersions upon plaintiff's reputation and competence by attributing to him the responsibility for the Franklin National Bank's foreign currency exchanges and the Bank's losses in that field. The Court below erred in failing to read the article in this manner.

The leading case of Moore vs. Francis, supra, held libelous per se such a slur on a plaintiff's professional competency.

> "'Whatever words have a tendency to hurt, or are calculated to prejudice a man who seeks his livelihood by any trade or business, are actionable.' When proved to have been spoken in relation thereto, the action is supported, and unless the defendant shows a lawful excuse, the plaintiff is entitled to recover without allegation or proof of special damage, because both the falsity of the words and resulting damage are presumed. 1 Saund, 234, n.; 1 Am. Lead. Cas. 135". (Page 206) (Emphasis added)

> "...words affecting a man injuriously in his trade or occupation, may be libelous, although they convey no imputation upon his character. Words, says Starkie, are libellous if they affect a person in his profession, trade, or business, 'by imputing to him any kind of fraud dishonesty, misconduct, incapacity, unfitness or want of any necessary qualification in the exercise thereof.' Stark, Slander §188." (Page 206) (Emphasis added.)

In a case strikingly similar to the one at bar, the Appellate Division, in Daily vs. Engineering and Mining Journal, 94 App. Div. 314, 88 N.Y.S. 6 (First Dept. 1904), held libelous per se articles concerning the plaintiff, a financial manager engaged in "important financial and commercial enterprises in the United States involving the use and management by the plaintiff of

large sums of money entrusted to him by other persons residing in the United States and foreign countries." The defamatory articles stated of plaintiff "his extravagance startled people and finally got the company into trouble. He was deposed, and is no longer in California. The bills will doubtless be paid but it remains to be seen whether the mine pays as well as the stockholders were led to expect." The complaint alleged that this meant and intended to mean that plaintiff caused the mining company to become financially embarrassed by using its funds for plaintiff's own personal extravagance and that because thereof he was removed from his position as manager and absconded from the State. A separate article charged that "The whole failure is the result of extravagant management. The breaking of the company involves San Francisco and London financiers and banks...The deal for the sale of the mine and its equipment was managed by [plaintiff]."

The Appellate Division held that "The inference is natural that it was intended to state that such condition was brought about by the plaintiff's extravagant management; and, as the result, we have the charge against the plaintiff that, by extravagance in handling the business of the company, he caused it to become insolvent." The Court stated that each of the publications charged plaintiff with extravagance, if not with incompetence in the conduct of plaintiff's business, and said:

"Charges, even though they do not impute to plaintiff disgraceful conduct, would be actionable if their tendency is to injure him in his particular business, calling, trade, or profession. Ordinarily, the characterization of a person as extravagant would not be libelous, because persons are not necessarily lessened in the esteem of others merely because they are extravagant; but a charge that one's extravagance has brought to bankruptcy a company or enterprise in which others are interested may injuriously affect any man, and particularly one whose business it is to act as the manager of large enterprises in which others have invested money. We think, therefore, that the complaint, taking the fair import of the articles, namely, that the plaintiff, as manager, so extravagantly conducted the affairs of the company as to injure its credit to such an extent that attachments in favor of creditors were allowed against it, in connection with the averments as to the plaintiff's business or calling, states a good cause of action. Because, whether or not we construe the language as holding the plaintiff up to public scorn or ridicule, which would be a question of fact for the jury, or whether we conclude that its tendency, as claimed, was to inflict special damage on his business reputation and calling, in either view the complaint states a good cause of action." (P 9) (Emphasis added.)

The concurring opinion added that:

"The article published by defendant, if believed, would certainly injure the reputation of a man engaged in the management of important financial and commercial enterprises involving the use of large sums of money by others. No one would care to intrust a man with large sums of money to aid in important financial commercial enterprises if his extravagance when engaged in like enterprises had been such as to startle people and get a company with which he was connected into trouble. The libel, charging that a mine managed by the plaintiff had become largely insolvent as a result of extravagance, would necessarily

> impute to the person responsible for the management a lack of proper business capacity, and would thus be a direct charge of business incapacity, which would entitle him to maintain an action for damages caused by the publication." 88 N.Y.S. at P. 10. (Emphasis added.)

The article in the Journal of Commerce charged Bordoni with responsibility for the Bank's huge foreign exchange losses thereby affecting and impeaching his business capacity. Certainly this is so when the article is read as a whole, as it must be. Words by themselves innocent, may become deadly when used together.

The Court of Appeals in November vs. Time, Inc., 13 N.Y. 2d 175, 244 N.Y.S. 2d 309 (1963), stated that all of the article must be read in context to determine whether it is libelous per se; that the Court must not treat such language in its most inoffensive meaning; and the Court should apply such meaning to the article as one to whom it was addressed would construe it; further, that a jury should decide whether a libelous meaning should be ascribed.

> "If every paragraph had to be read separately and off by itself plaintiff would fare pretty well. But such utterances are not so closely parsed by their readers or by the courts and their meaning depends not on isolated or detached statements but on the whole apparent scope and intent (Moore vs. Bennett, 48 N.Y. 472, 476.) Plaintiff is a professional man. 'If, on their face, they [the words] are susceptible in their ordinary meaning of such a construction as would

tend to injure him in that capacity, they are libelous per se and the complaint, even in the absence of allegation of special damages, states a cause of action' (Kleeberg vs. Sipser, 265 N.Y. 87, 91-92, 191 N.E. 845, 846). The courts 'will not strain' to interpret such writings 'in their mildest and most inoffensive sense to hold them nonlibelous' (Mencher vs. Chesley, 297 N.Y. 94, 99, 75 N.E. 2d 257, 259). The words are to be construed not with the close precision expected from lawyers and judges but as they would be read and understood by the public to which they are addressed (Sydney vs. Macfadden Newspaper Pub. Corp., 242 N.Y. 208, 214, 151 N.E. 209, 210, 44 A.L.R. 1419). 'The casual reader might not stop to analyze, but could easily conclude that plaintiff is a crook and let it go at that' (Van Voorhis, J., in Cassidy vs. Gannett Co., 173 Misc, 634, 639, 18 N.Y.S. 2d 729, 734)". 13 N.Y. 2d at P. 178, 179. (Emphasis added.)

* * *

"No single sentence or declaration of alleged fact is directly and boldly defamatory but a jury should decide whether a libelous intendment 'would naturally be given to it by the reading public acquainted with the parties and the subject matter' (Cassidy vs. Gannett Co., 173 Misc. 634, 640, 18 N.Y.S. 2d 729, 734 supra)." (Emphasis added.)

"The gloss or interpretation which plaintiff would have the jury apply is derived not from external facts but is one which a reader might not irrationally attach to the article as written. The jury will be asked not to alter or expand the meaning of the actual words but to adopt a possible construction of them and it will be for the jurors to determine in which of two possible senses the words were used (see Morrison vs. Smith, 177 N.Y. 366, 369, 69 N.E. 725, 726; First Nat. Bank of Waverly vs. Winters, 225 N.Y. 47, 50, 121 N.E. 459, 460; Hoeppner vs. Dunkirk Printing Co., 254 N.Y. 95, 104, 172 N.E. 139 141, 72 A.L.R. 913)." 13 N.Y. 2d at P. 179.

In Sullivan vs. Daily Mirror, Inc., 232 App. Div. 507 250 N.Y.S. 420 (First Dept. 1931), the Appellate Division reversed the lower court's dismissal of plaintiff's Complaint. Plaintiff had claimed that two articles published by the defendant concerning him were libelous per se. In reviewing the articles, the Court held:

> "We are of the opinion that the learned justice at Special Term took an erroneous view of the effect of the publication. It is well settled that words that impute dishonesty are actionable per se (Den Norski Ameriekalinje Actiesselskabet vs. Sun Printing & Publishing Ass'n., 229 N.Y. 617, 129 N.E. 931), and that the publication of a charge which has a tendency to injure or prejudice one in the exercise of his profession or calling is libelous per se. (Ben-Oliel vs. Press Publishing Co., 251 N.Y. 250, 167 N.E. 432). So, too in construing an article it is to be considered in its entirety and in the light of the peculiar facts and circumstances to which it relates. More vs. Bennett, 48 N.Y. 472; Kloor vs. New York Herald Co., 200 App. Div. 90, 192 N.Y.S. 465. The test is whether to the mind of an intelligent man the tenor of the article and the language used naturally import a criminal or disgraceful act. Rossiter vs. New York Press Co., 141 App. Div. 339, 126 N.Y.S. 325; Church vs. Tribune Ass'n., 135 App. Div. 30, 119 N.Y.S. 885. We are of the opinion that the publications justify the innuendo pleaded. We cannot read the articles in their entirety without being convinced of their tendency to impress the average intelligent mind with disgraceful conduct on the part of the plaintiff in the exercise of his profession." 250 N.Y.S. at P. 423 (Emphasis added.)

The Journal is a sophisticated commercial newspaper competing with the Wall Street Journal as a major business-interest publication. It is published worldwide for and read by business people, bankers, and professionals. The articles published in the Journal are intended to make an impact on the business community. It is not equivalent to the Daily News or the Racing Form or the National Enquirer. The Court should interpret the article as a banker, businessman, and professional would interpret it.

> "It is to be observed that the articles here are written in a sporting vernacular which is easily and readily understood by those interested in prize fighting, and who read and follow daily sporting pages of newspapers. Such readers are familiar with the various persons and characters who participate in this class of sport and with their reputation for honesty or dishonesty, as the case may be. Certainly, to this class of readers the articles may well be open to the construction which the plaintiff has placed upon them in his pleading." (Sullivan vs. Daily Mirror, supra, Page 424.)

The misfortunes of the Franklin National Bank had an effect on the business and commercial community. It was a news-worthy item for the Journal. The defendants knew that the article would be read by powerful financiers, businessmen, and bankers and that it would be interpreted by them as to lay at Bordoni's door-steps the Bank's $45.8 million foreign exchange loss. One need not strain to so read the article and to believe that as a result of such losses Bordoni was incompetent, negligent, and/or involved in some fraud or criminal wrongdoing.

In the case of Vigoda vs. Marchbein, 13 App. Div. 2d 111, 213 N.Y.S. 2d 778 (1st Dept., 1961) the alleged defamatory words memorialized in a letter to members of an association (Professional Orthodox Jewish Cantors), in which plaintiff was a member, were that plaintiff "asked our office secretary to give him 'a certain amount of blank receipts' from our receipt book, which she did. All he has turned in to our office from the appeal was $250 (two hundred and fifty dollars.) As your Secretary at that time, I had to ask [plaintiff] for an account of all the receipts he had taken. He got very angry at me, saying I do not trust him!" The Appellate Division affirmed the Supreme Court in sustaining the sufficiency of the plaintiff's Complaint in alleging that the language of the letter was libelous per se.

> "In our opinion the complaint is legally sufficient. The triers of the fact might find that the communication reasonably implied and was so interpreted by the recipients to charge that plaintiff had obtained blank receipts from an employee of the Association, made solicitation of funds and thereafter failed to turn in the contributions until compelled to account for the blank receipts. 'It has long been the rule that words charged to be defamatory are to be taken in their natural meaning and that the courts will not strain to interpret them in their mildest and most inoffensive sense to hold them non-libelous.' Mencher vs. Chesley, 297 N.Y. 94, 99, 75 N.E. 2d 257, 259. 'The libel law has never been confined to charges of illegality or lawbreaking. Any false accusation which dishonors or discredits a man in the estimate of the public or his

> friends and acquaintances or has a reasonable tendency so to do is libelous.' Bennet vs. Commercial Advertiser Ass'n. 230 N.Y. 125, 127, 129 N.E. 343, 344." 213 N.Y.S. 2d at P. 780.

In Brown vs. Tregoe, 236 N.Y. 497 (1923), the article alleged to be libelous per se stated that plaintiff, operator of a mercantile agency business, was formerly employed by a company and lost his position, then was employed by another company which was critical of him, that there was information criticizing his paying qualities and his ungentlemanly practices and that... "prospective users of [plaintiff's] agency should satisfy themselves thoroughly as to the abilities and character of the men back of it.' The Court held:

> "Under proper innuendoes, we think that a jury at least would be permitted to say that when defendants, with the surrounding statements, reported that 'the paying qualities' of Brown had been criticized, this would mean, either that he was in financial straits and thus unable to pay promptly, or else that he intentionally and improperly retained moneys which came into his hands in his collection business. The possession and exhibition of either of these qualities by plaintiff undoubtedly would impair his standing and character in his business where, as the article stated, promptness of remittances was especially important, and thus the article might be found to contain charges affecting plaintiff's standing, honesty, and reliability in the business which he is pursuing, and, if untrue, they would be libelous per se. Townsend on Slander §191; Moore vs. Francis, 121 N.Y. 199, 23 N.E. 1127, 8 L.R.A. 214, 18 Am. St.

Rep. 810; Woodruff vs. Bradstreet Co., 116 N.Y. 217, 22 N.E. 354, 6 L.R.A. 555; Hartnett vs. Plumbers' Supply Ass'n. of New England, 169 Mass. 229, 235, 47 N.E. 1002, 38 L.R.A. 194." 236 N.Y. at P. 502. (Emphasis added.)

As an international banker, monetary expert, and author, Bordoni's reputation rested on the cornerstone of professional integrity and skill. To perform, he must be of impeccable character and highly successful. To attribute to him dishonesty and incompetency in a respectable financial journal of worldwide circulation, is to destroy this cornerstone and bury him in its rubble.

Other articles making similar charges have been held to be libelous per se where the plaintiff's integrity, honesty, and standing in his business have been defamed. An article was held to be libelous per se where it reported the failure of commission merchants was due to plaintiff's reckless speculation in lard. Sawyer vs. Bennett, 20 N.Y.S. 835 (Sup. Ct., Gen. Term, First Dept. 1892).

In Liccione vs. Collier, 133 App. Div. 40, 117 N.Y.S. 639 (First Dept. 1909), it was held to be libelous per se to charge that a banker made inaccurate accountings and over-charges to ignorant depositors.

In the case of Jacquelin vs. Morning Journal Association, 39 App. Div. 515, 57 N.Y.S. 299 (First Dept. 1899), the Appellate Division affirmed a judgment predicated upon a claim of libel per se where the newspaper article stated, "It was learned at the Broadway Savings Bank and the Broadway National Bank that Mr. Rogers [plaintiff's intestate] had been suddenly dropped from their Board of Directors, but no information could be had for the reasons for this," and further that Rogers was a defendant in a fraud case, a spiritualist, and had left the State to avoid process.

In Rodger vs. American Kennel Club, Inc., 131 Misc. Rep. 312, 226 N.Y.S. 451 (Sup. Ct., N.Y. Co. 1928), an article stating that plaintiff, a breeder of dogs, had been charged with misconduct in connection with the sale of a dog and had been suspended from the privileges of the club, was held to be "directly calculated to affect the plaintiff in his business" and, therefore, libelous per se without proof of special damages.

In the case of Kahane vs. Murdoch, 218 App. Div. 591 218 N.Y.S. 641 (First Dept. 1926), the Court held that there was a legitimate innuendo of libel per se. The writing before the Court stated that the plaintiff "went so far as to alter or forge orders after they had been given, so as to increase the size of the orders." It was held proper to allege in the Complaint the innuendo that plaintiff had committed the crime of forgery. Said the Court: "We think this is a legitimate innuendo from the

charge itself, and should have been allowed to remain in the Complaint. It does not transcend the meaning of the charge itself, and the words used therein are susceptible of the meaning ascribed." 218 App. Div. at P. 592.

Such construction of the article is reasonable. A contrary meaning would be strained.

The article published by defendants stated that the government is investigating the possibility of fraud in connection with the losses." The losses were the foreign exchange losses which the article attributed to Bordoni. By innuendo, therefore, the article stated that Bordoni may have been involved in some kind of fraudulent criminal activity in connection with such losses. Such a construction is reasonable. A contrary meaning would be strained.

The Court of Appeals in Sanderson vs. Caldwell, 45 N.Y. 398 (1871) established the following rules for construction:

> "In an action for defamation, if the application or meaning of the words is ambiguous, or the sense in which they were used is uncertain, and they are capable of a construction which would make them actionable, although at the same time an innocent sense can be attributed to them, it is for the jury to determine upon all the circumstances, whether they were applied to the plaintiff, and in what sense they were used.
>
> The publisher of a libel cannot escape liability by veiling a calumny under artful or ambiguous phrases, or by indirectly charging that which would be slanderous, if imputed in direct and undisguised language.

> The language of the publication in this case, if capable of an innocent construction, is also clearly capable of a construction which would make it libelous. 45 N.Y. at P. 401.
>
> * * *
>
> They may not in fact have had in mind the particular meaning charged by the plaintiff, or intended the special injury produced; but the law for remedial purposes, adjudges that a wrongdoer intends all the natural and proximate consequences of the wrong, and administers punishment and allows compensation upon this presumption." 45 N.Y. at P. 404.

In Mencher vs. Chesley, 297 N.Y. 94 (1947), the Court of Appeals reaffirmed the law by stating:

> "[1] It has long been the rule that words charged to be defamatory are to be taken in their natural meaning and that the courts will not strain to interpret them in their mildest and most inoffensive sense to hold them nonlibelous. See e.g., Townsend vs. Huges, 2 Mod. 150, 159; Turrill vs. Dolloway, 17 Wend. 426, 428; Cafferty vs. Southern Tier Publishing Co., 226 N.Y. 87, 93, 123 N.Y. 76, 78. While in the present case there was no direct charge that plaintiff was a communist or had communist affiliations or that he had misused his public office, the statement, read against the background of its issuance, under the circumstances of its publication, is certainly susceptible of such a construction. 297 N.Y. at P. 99 (Emphasis added.)
>
> * * *
>
> We do not - indeed, we may not - determine that that is the only meaning to be placed upon the words used; to do so would encroach upon the province of the jury. It is enough

> that reasonable basis exists for such an interpretation. Once that is decided, it becomes the jury's function to say whether that was the sense in which the words were likely to be understood by the ordinary and average reader." (p. 100)

So too in the following cases where the Courts held that where words are capable of more than one construction, it is for the jury to determine in what sense they were intended and, therefore, whether they were libelous. Rovira vs. Boget, 240 N.Y. 314 (1925); Neaton vs. Lewis Apparel Stores, Inc., 267 A.D. 728, 48 N.Y.S. 2d 492 (3rd Dept. 1944).

It is submitted that the statements in the article pertaining to plaintiff are libelous per se. However, at the very least, the Court below should have allowed a jury to determine whether the words used could reasonably be construed and interpreted in such manner.

(c) The New York "Single Instance" Rule Is Not Applicable in the Case at Bar

In determining that the article was not libelous per se, the District Court avoided the question of whether the Complaint should be dismissed under the "single instance" rule, a point briefed in the Court below. However, in his opinion in Bordoni vs. New York Times, (A 77-94), Judge Weinfeld held that "even if the article [in the Times] were read to defame plaintiff, the complaint must be dismissed under New York law." (A 89).

It is submitted that the "single instance" rule does not bar recovery under the facts herein, nor under the cases.

Defendants' contention that the article in question is not libelous per se since it only charges plaintiff with misfeasance on a single occasion in organizing the Franklin National Bank's foreign exchange department and relates to one aspect of his varied professional career is not consonant with the contents of the articles and lacks legal merit.

The New York "single instance" rule is a limited doctrine which requires special damages to be pleaded and proved if the defamatory material does not imply general unskillfulness, general incompetence, or lack of integrity in a professional's calling and such material relates only to a particular isolated transaction in an individual's trade or profession. The rule has no application where the article charges the plaintiff with commission of a criminal act.

In the instant action defendants' article does not state nor imply that plaintiff made only one error involving an isolated transaction with respect to Franklin National Bank's foreign exchange department. Rather, it charges that the plaintiff was chosen to play a major part in the Bank's foreign exchange trading, but that these transactions resulted in Franklin National Bank's suffering losses of $45.8 million, which in turn brought the Bank to the brink of financial disaster. Further, the article implies that plaintiff was involved in fraudulent and illegal transactions and that he may be subject to criminal prosecution.

In November vs. Time, Inc., supra, an article stated that plaintiff, an attorney, had failed to properly advise a client to appear at a hearing to be held by the Attorney General of New York State. The language in the article was as follows:

> "D'Amato also got into difficulty when he failed to answer a subpoena issued by State Attorney General Louis Lefkowitz. D'Amato says that November, who serves as attorney for D'Amato and Patterson told him to ignore it, that the hearing had been postponed. D'Amato did as he was instructed and he was arrested, hauled into Court, fined $250 and given a suspended sentence of 30 days in the workhouse. The case is now on appeal, but D'Amato was to see Lefkowitz Tuesday and there were reports 'something might happen to him.'" 13 N.Y. 2d at P. 177, 178.

Defendant in the November case argued that the article merely accused plaintiff of a single instance of professional error. The Court refused to apply the "single instance" rule since it felt that the article did not merely charge the attorney with professional ignorance or lack of skill on a single occasion but rather imputed a total lack of professional conduct.

The position adopted in November was followed in Mason vs. Sullivan, 26 App. Div. 2d 115, 271 N.Y.S. 2d 314 (1st Dept., 1966). In Mason, the plaintiff, a comedian, alleged libel as a result of defamatory statements concerning one performance on defendant's television show. The Court rejected the "single instance" rule advocated by the defendant since it felt that the statements imputed to plaintiff a complete lack of professional character and conduct.

In the case at bar, the "single instance" rule is likewise not applicable. The defendants, for the purposes of

their motion, have admitted plaintiff's expertise and reputation in the international banking field. Therefore, to attribute to him Franklin National Bank's foreign exchange losses of $45.8 million over a substantial period of time is to generally attack and discredit his skillfulness, competency, and integrity in his chosen field. The accusation is not to one specific foreign currency transaction or single advice, but to the entire series of foreign currency transactions conducted by the Bank at the direction of Bordoni. See November vs. Time, Inc., supra, and Twiggar vs. Ossining Printing and Pub. Co., 161 A.D. 718, 146 N.Y.S. 529 (1914).

In Kleeberg vs. Sipser, 265 N.Y. 87, 191 N.Y.S. 845 (1934), the Court of Appeals held that the "single instance" rule was not applicable where the libel related to a series of transactions pertaining to one particular client of the plaintiff. Kleeberg, a New York attorney, was retained to represent a client in conjunction with the negotiations of a certain business transaction. Sipser (whose relationship to the transaction is not clear) during the course of negotiations, on five separate occasions, accused Kleeberg of not properly representing his client's interests, attempting to sabotage the deal, and merely favoring lawsuits. The Court, in denying plaintiff's motion to dismiss the Complaint, stated:

> "...This language is such that a jury could find that it amounts to an untrue charge of numerous infractions of elementary professional ethics and that it tended to bring gross discredit upon the attorney." 265 N.Y. at P. 93.(Emphasis added.)

In Arnold Bernhard & Co., Inc. vs. Financial Pub. Corp., 25 N.Y. 2d 712, 307 N.Y.S. 2d 220 (1969), the appeals courts applied the "single instance" rule since the article had merely referred to an error in judgment with respect to one particular recommendation concerning a specific stock, which could not be expanded to impute a lack of integrity or professional misconduct with respect to the general publication of the magazine. This is clearly distinguishable from the accusations in the Journal article.

Moreover, the article published by defendants does not merely attack plaintiff's general competence in his field, but goes further and implies that plaintiff was involved in fraudulent and illegal transactions. Charging an individual with a crime is libelous per se and generally attacks plaintiff's integrity. This, in and of itself, renders plaintiff's Complaint actionable without alleging special damages.

CONCLUSION

The article of June 26, 1974 is libelous *per se*. The "single instance" rule is not applicable. The opinion of the District Court to the contrary was erroneous. The judgment appealed from should be reversed.

Respectfully submitted,

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